91-211

No._____



# In the Supreme Court of the United States

OCTOBER TERM, 1991

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JOHN JOSEPH DIPETTO AND MICHELE DIPETTO,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In *Spies v. United States*, 317 U.S. 492 (1943), this Court held that the mere failure to file an income tax return or pay a tax, however willful and intentional, only constitutes the misdemeanor crime of failure to file a return, and, to elevate that crime into the felony of willful attempt to evade a tax, there also must be some affirmative act constituting an attempt. The question presented here is whether an individual's failure to correct a false form W–4 previously submitted to his employer may constitute an affirmative act under *Spies* which would elevate a failure to file misdemeanor into the felony of attempt to evade a tax, and, in any event, whether an individual's failure to correct a prior criminal act ever could constitute a crime without violating the Fifth Amendment ban against compelled self-incrimination.

2. In *United States v. Beacon Brass Company*, 344 U.S. 43 (1952), this Court held that the statute of limitations for attempt to evade a tax runs from the last affirmative act of evasion. The question presented here is whether the mere passing of the April 15 tax return filing deadline, without more, may constitute a last affirmative act of evasion that is sufficient to trigger the statute of limitations.

3. In *Sansone v. United States*, 380 U.S. 343 (1965), this Court held that the tax evasion statute, 26 U.S.C. 7201, defines two separate crimes, evasion of assessment of taxes and evasion of payment of taxes. The question presented here is whether a conviction upon an indictment that charges willful evasion of assessment of taxes may be supported where the

## QUESTIONS PRESENTED
(Continued)

evidence presented by the Government solely proves evasion of payment of taxes.

4. In *Cheek v. United States*, 498 U.S. ___, 111 S. Ct. 604 (1991), this Court held that, in order to prove willfulness in a tax evasion prosecution, the government must prove that the defendant did not have a subjective belief that he was not required to file an income tax return and that "...forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." The question presented here is whether the District Court's failure to permit defendants to explain the legal provisions upon which they based their subjective good faith belief improperly prevented them from presenting a meaningful defense.

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# In the Supreme Court of the United States

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No. _____

JOHN JOSEPH DiPETTO AND MICHELE DiPETTO,
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*v.*

UNITED STATES OF AMERICA

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners John Joseph DiPetto and Michele DiPetto respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 18, 1991.[1]

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[1] The first Question Presented herein is similar to the question presented in the Petition for a Writ of Certiorari in *Williams v. United States*, Docket No. 90–1748, filed in this Court May 13, 1991.

## OPINION BELOW

The opinion of the Court of Appeals (App A., *infra* 1a) will be reported at 934 F.2d ___. There was no opinion of the District Court.

## JURISDICTION

The judgment of the Court of Appeals (App A., *infra* 1a) was entered on June 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## AUTHORITIES INVOLVED

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

Section 7201 of the Internal Revenue Code (26 U.S.C.):

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall...be guilty of a felony...

Section 7203 of the Internal Revenue Code (26 U.S.C.):

Any person required under this title to pay any ...tax or required by this title...to make a return,...who willfully fails to pay such...tax [or] make such return, at the time or times required by law or regulations, shall...be guilty of a misdemeanor....

Section 6531(2) of the Internal Revenue Code (26 U.S.C.):

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found...within 3 years next after the commission of the offense, except that the period of limitations shall be six years—

* * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

Section 6020(b) of the Internal Revenue Code (26 U.S.C.):

(1) If any person fails to make any return...required by any internal revenue law or regulation made thereunder at the time prescribed therefor,...the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

Section 6012(a)(1) of the Internal Revenue Code (26 U.S.C.):

(a) GENERAL RULE—Returns with respect to income taxes under Subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual—

* * *

Treasury Regulations (26 C.F.R.) Section 31.3402(f)(2)–1(g) are quoted verbatim in Appendix C. (*Infra*, at 11a.)

## STATEMENT

John and Michele DiPetto were indicted in a four–count indictment, and charged under Section 7201 with attempting to evade federal income taxes for 1983, 1984, 1985 and 1986. A copy of the indictment is attached. (App. B, *infra* at 6a.)

Each count alleged that they willfully attempted to evade income taxes by failing to file an income tax return, failing to pay income taxes and by

> "submitting to their employers false and fraudulent Employee's Withholding Allowance Certificates, Forms W–4, [on which each defendant] claimed exemption from the withholding of income taxes, for the purpose of concealing and attempting to conceal from all

proper officers of the United States of America their true and correct income."

Forms W–4 are filled out by employees and used by employers to figure out how much federal income tax to withhold from an employee's wages. On their W–4 forms, Mr. and Mrs. DiPetto claimed they were exempt from income taxes. As a result, no federal income taxes were withheld from their wages.

Most of the Withholding Allowance Certificates, Forms W–4, were submitted prior to April 4, 1984.[2] The indictment was returned April 4, 1990.

At trial, the DiPettos stipulated that they had not filed an income tax return for the year 1983 on April 15, 1984, and that they had not filed for 1984, 1985, and 1986 on April 15, 1985, April 15, 1986, and April 15, 1987, respectively. They also stipulated that they submitted to their employers Forms W–4 on which they reported to their employers that they were exempt from income taxes. Michele's W–4's were submitted to her employer on September 27, 1982, January 20, 1983, January 6, 1987 and April 15, 1987. John's Forms W–4 were submitted to his employers on October 18, 1982, February 17, 1983, February 4, 1984, November 19, 1984, March 26, 1985, and January 6, 1987.

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[2] John DiPetto also submitted such W–4's to his employer in 1984 after April 4, and in 1985. He would not be entitled to reversal of his conviction for those years under the statute of limitations issue presented herein. Both John and Michele DiPetto also submitted such W–4's in 1987, a year not charged in the indictment. Of course, the W–4's submitted in 1987 had no effect on withholding of taxes in the years charged in the indictment.

Forms W–4 are kept in the files of the employer and are not filed with the Internal Revenue Service ordinarily. However, these particular W–4's were submitted by the employers to the Internal Revenue Service only because they contained claims of exempt status. Treasury Regulations (26 C.F.R.) Section 31.3402(f)(2)–1(g)(1)(ii) requires employers to submit W–4's containing claims of exempt status to the IRS. Section 31.3402(f)(2)–1(g)(5)(ii) requires the IRS to determine the correctness of the claim and to direct the employer to withhold nearly maximum taxes from the employee's wages if the correctness of the claim cannot be verified. Forms W–4 are never received by the IRS for informational purposes, but only for the purpose of verifying possibly false claims and correcting such suspect claims that cannot be verified as correct. The IRS does not rely upon W–4's.

Forms *W–2* are sent by employers to the IRS for reliance purposes. The government stipulated that the DiPettos gave their employers correct W–2 identifying information which, in turn, the employers used to file with the IRS accurate and identifiable W–2's each year. The government stipulated that, on these W–2 forms, the DiPettos' employers reported to the IRS each year the correct wages for the DiPettos as well as the fact that no taxes had been withheld from their wages.

At the trial, the government proved that the false Forms W–4 resulted in the DiPettos' employers not withholding taxes from the DiPettos' wages. No evidence was received that the W–4's had the effect or purpose of "concealing and attempting to conceal from all proper officers of the United States of America their true and correct income" as charged. The W–4's said

nothing about income. Moreover, there was no evidence that the IRS relies on information contained in W–4's.

The DiPettos filed motions for judgment of acquittal on grounds, *inter alia*, that the government's proof did not show that the W–4's were submitted for the purpose charged in the indictment, *i.e.*, to conceal from all proper officers of the United States of America the defendants' true and correct income, and on grounds that all four counts against Michele and two counts against John were not returned within the six-year period of limitations. The District Court denied their motions at the conclusion of the government's evidence and at the conclusion of the trial.

During the defense case, John DiPetto testified that he and Michele DiPetto were tired of figuring out their taxes each year, that they had a good faith belief that they were not required to make income tax returns, that they knew that the IRS had sufficient information in the form of Forms 1099 and W-2 to prepare their returns for them, and that they believed that the IRS would, in fact, prepare their returns for them and present them a bill, which, DiPetto testified, they would have paid. DiPetto further testified that the language of the statute that requires a taxpayer to make a tax return (26 U.S.C. 6012(a)(1)) is no more mandatory than the language of the statute that requires the Secretary to prepare a return for a taxpayer who has not made a return on time, if sufficient information is available to the Secretary (26 U.S.C. 6020(b)). DiPetto testified that he and Michele DiPetto believed that sufficient information was available to the Secretary, and, therefore, that the Secretary was required to prepare their return for them based on such information.

To support this testimony, the defense attempted during direct examination to read Internal Revenue Code Section 6020(b) and, later, to have the District Court instruct the jury in accordance with Sections 6020(b) and 6012(a)(1). The defense also offered the testimony of an expert witness who had been an IRS revenue officer for 32 years, had been a supervisor of numerous revenue officers, and had recently retired from the IRS. In a proffer, it was disclosed that the expert witness would have testified that it is the usual practice for the IRS to solicit tax returns from non-filers rather than refer the case for prosecution (as was done here). The expert would have testified that, before a case would be referred for criminal prosecution, the IRS would prepare a return for the taxpayer from available information if the available information was sufficient. Based on the information that IRS witnesses previously had admitted was available, the proffer was that the expert would have testified that the information that was available to the IRS was "nicely laid out" and easily could have been used to prepare a tax return in accordance with Internal Revenue Code Section 6020(b).

The District Court refused to permit DiPetto to explain his reliance upon Section 6020(b), refused to give a jury instruction submitted by the defense which was in accordance with Sections 6020(b) and 6012(a)(1), and refused to permit the defense expert witness to testify in accordance with the proffer.

In the defense opening statement, the defense informed the jury of the requirement of *Spies* that the government must prove beyond a reasonable doubt that petitioners committed some affirmative act likely to mislead the IRS and to conceal income from the IRS.

The defense stated that the government would fail in this effort because the only evidence of affirmative conduct consisted of the W-4's that petitioners submitted to their employers. Since these W-4's were not filed with the IRS, the defense said, the government would not be able to show that the submission of the W-4's constituted conduct likely to mislead the IRS or to conceal income from the IRS. However, the government proved that the Forms W-4 were, in fact, sent to the IRS by the employers, and, from that proof, the government contradicted the defense's argument that the IRS could not be misled.

The defense, therefore, wanted to show the jury the circumstances under which the W-4's were submitted to the IRS by the employers, *i.e.*, pursuant to the Treasury Regulations that require only certain W-4's that are likely to be false, such as those that claim exempt status, to be submitted, investigated, and corrected. The defense stated it wanted to negate the inference that the W-4's were submitted in order to be relied upon by the IRS. The defense requested that the court give a jury instruction offered by the defense which tracked the language of the applicable Treasury Regulations. The court refused to give the instruction.

The Court of Appeals affirmed the convictions. That court acknowledged that *Spies v. United States* requires that the felony of attempted tax evasion requires that there be an affirmative act. The court, however, held:

> "by maintaining rather than correcting the false W–4's, the DiPettos perpetuated their attempted deception. *See United States v. Williams*, 928 F. 2d 145, 149 (5th Cir. 1991).

> The filing and maintaining of the false Forms W–4 satisfied the affirmative act requirement set forth in *Spies v. United States*, 317 U.S. 492, 499 (1943)."

The Court of Appeals also concluded that the statute of limitations for each year began to run on the date the tax return for that year was due to be filed. The court held that the DiPettos' failure to file on that date constituted the last act of evasion.

## REASONS WHY THE WRIT SHOULD ISSUE

**1. An individual's failure to correct a false Form W–4 previously submitted to his employer may not constitute an affirmative act under *Spies* which would elevate a failure to file misdemeanor into the felony of attempt to evade a tax and may not constitute the basis for criminal liability in any event as it would violate the Fifth Amendment guarantee against self-incrimination.**

The Court of Appeals' decision not only undermines this Court's decision in *Spies v. United States*, 317 U.S. 492 (1943), but it also raises serious Constitutional concerns.

### The Decision Undermines *Spies v. United States.*

In *Spies*, this Court held that the failure to file a tax return may be a lesser included offense with respect to the felony of attempted tax evasion and that "the difference between the two offenses...is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection." 317 U.S. at 498. For a

failure to file a tax return or pay a tax to constitute a felony, there must be "some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty [to file a return or pay a tax]" may constitute a misdemeanor, but not the felony of attempted tax evasion. *Id.* at 499.

Evidence which purports to prove attempted tax evasion by alleged means which, in fact, are mere omissions or failures to act, is defective and cannot support a conviction under Code Section 7201. Here, the indictment charged the DiPettos with attempting to evade their taxes by *failing* to file tax returns, by *failing* to pay taxes, and by

> "submitting to their employers false and fraudulent Employee's Withholding Allowance Certificates, Forms W–4, [on which each defendant] claimed exemption from the withholding of income taxes, for the purpose of concealing and attempting to conceal from all proper officers of the United States of America their true and correct income."

The first two alleged means (failing to file and failing to pay) are mere omissions or failures to act, and cannot support a conviction. The third alleged means (submitting false W–4's to their employers) is affirmative conduct, but not the kind of affirmative conduct required by this Court's decisions.

In *Spies*, 317 U.S. 492 (1943), this Court held that an affirmative act of evasion is any conduct the likely effect of which would be to mislead or to conceal. *Id.* at

499. In *United States v. Beacon Brass Company*, 344 U.S. 43 (1952), this Court implied that the required concealment must be (a) concealment *of income* and (b) concealment of income *from Treasury representatives*. 344 U.S. at 45–46.

Since the W–4's herein say nothing about income (or about any factor relevant in computing taxable income), they clearly cannot conceal income. This, by itself, is sufficient to disqualify the submission of a W–4 that falsely claims exemption from being the kind of affirmative act required by *Spies* and *Beacon Brass*.

In addition, since W–4's are not ordinarily filed with the IRS, are never filed with the IRS for reliance purposes, and only were submitted to the IRS in this case because of their conspicuous claim of exemption, and under a regulatory scheme meant to remedy incorrect W–4 statements (as opposed to providing information meant to be relied upon by the IRS), *see* Treasury Regulations (26 C.F.R.) Section 31.3402(f)(2)–1(g), such W–4's could not conceal anything, much less income, from Treasury representatives. Thus, the submission of these forms could not be conduct that could mislead the IRS or conceal income from the IRS in accordance with *Spies*.

The only relevant informational forms meant to be relied upon by the Treasury are the *W–2's*. At trial, the government stipulated that the DiPettos provided to their employers correct identifying information for their W–2's and that each employer filed accurate W–2's with the IRS each year. The W–2's reported to the IRS petitioners' correct wages, as well as the fact that no taxes had been withheld from their wages.

Based on the different functions of W–4's and W–2's, false W–4's that are submitted to employers could not conceal income from anyone, as required, because they say nothing about income. Nor could false W–4's conceal anything from Treasury representatives, as required, because they are not filed with the Treasury for reliance purposes.

The Second Circuit stated that the jury concluded that the DiPettos filed false W–4's "in an attempt to mislead the government or conceal from the government the correct amount of their taxable income." (App. A, 1a.) However, the court did not discuss *how* W–4's, which say nothing about income, and which were submitted to the IRS only to be investigated, see Treasury Regulations, *supra*, could possibly mislead the government or conceal income from the government.

The Second Circuit then held that, "by maintaining rather than correcting the false W–4's the DiPettos perpetuated their attempted deception," citing *United States v. Williams*, 928 F.2d 145, 149 (5th Cir. 1991), petition for writ of certiorari pending, *Williams v. United States*, Docket No. 90–1748. However, unlike the indictment in *Williams*, the indictment here does not allege as an act of evasion the "maintaining rather than correcting" of false W–4's. Even if it did, based on reasons discussed in the petition for a writ of certiorari in *Williams*, "maintaining on file rather than correcting" is a mere omission, and not the commission required by *Spies*. 317 U.S. at 499.

Because the W–4's here say nothing about income and are not relied upon by the IRS, they could not constitute conduct the likely effect of which would be to

mislead the IRS or to conceal income from the IRS as required in *Spies* and *Beacon Brass*. Moreover, the uncharged "act" of "maintaining rather than correcting" the false W–4's, which the Court of Appeals relied upon as an alternative (but uncharged) affirmative act, also cannot be considered affirmative conduct. For these reasons, the opinion of the Second Circuit extends the scope of the tax evasion statute to mere failures to act, without the additional affirmative conduct that is likely to mislead the IRS or to conceal income from the IRS, that is required by *Spies*. The decision of the Court of Appeals, therefore, conflicts with *Spies*.

**The Decision Violates the Fifth Amendment.**

The Court's reasoning also raises serious Constitutional issues. The Second Circuit held, "by maintaining rather than correcting the false W-4's the DiPettos perpetuated their attempted deception. *See United States v. Williams*, 928 F.2d 145, 149 (5th Cir. 1991)." This reasoning of the Fifth Circuit in *Williams* and of the Second Circuit in this case is based on a radical departure from our criminal jurisprudence and raises grave Constitutional concerns, which petitioners did not have an opportunity to address below.

The "maintaining rather than correcting" rationale has never been recognized as the basis for criminal liability. If it were, almost any federal crime would have an unlimited statute of limitations and would extend to any person who retained the benefits of that crime and failed to correct his acts. A bank robber would commit a continuing bank robbery merely by retaining the proceeds of the robbery. It could be argued that anyone who retains the benefits of a past crime would

continually be committing that crime. The statute of limitations never would expire under the Court of Appeals' "maintaining rather than correcting" rationale.

This not only would abrogate statutes of limitations, but it also would violate the Fifth Amendment proscription against compelled self-incrimination in that it would expose a person to a criminal penalty based on his failure to correct his previous criminal act. If a person "maintains rather than corrects" his past crime, he would be continuing to commit that crime. However, if he does correct his past criminal act, so as to avoid continuing to commit that crime, he incriminates himself in violation of the Fifth Amendment.

Moreover, the Second Circuit's reasoning ignores the fact that there is no duty in the Internal Revenue Code that requires a person who has submitted what is then a false W-4 to his employer to submit a correct W-4 thereafter. There cannot be such a duty because of Fifth Amendment self-incrimination concerns. Based on those concerns, there never has been a duty requiring a taxpayer who has filed a false tax return to correct that tax return by filing an amended return. *See, Badaracco v. Commissioner,* 464 U.S. 386, 397(1984).

Although there is no statute or regulation that requires a person to correct his prior false submission, and although such a statute would violate the Fifth Amendment's self-incrimination clause, the Court of Appeals based its decision on its perception that there is such a requirement. This reasoning is based on a requirement that does not exist in any statute or regulation and which, if it did exist, would run afoul of a fundamental Constitutional principle.

**2. The mere passing of the April 15 tax return filing deadline, without more, may not constitute "a last affirmative act of evasion" that is sufficient to trigger the statute of limitations.**

The statute of limitations for tax evasion is six years "next after the *commission* of the offense." 26 U.S.C. 6531(2). (Emphasis added.) In *Spies v. United States*, 317 U.S. 492 (1943), this Court distinguished between commissions and omissions, and held that a commission is required for the felony of willful attempt to evade taxes. 317 U.S. at 499. The only commission alleged in the indictment and proved at the trial was the DiPettos' submission to their employers of false W–4's.

In *United States v. Beacon Brass Company*, 344 U.S. 43 (1952), this Court held that the statute of limitations for attempt to evade a tax runs from the last affirmative act of evasion. An affirmative act of evasion is equivalent to the required *Spies* commission.

Michele DiPetto submitted allegedly false W–4's to her employer September 27, 1982 and January 20, 1983. These were the only allegedly false W–4's Michele submitted that stopped withholding of taxes from her wages during 1983 through 1986, the years charged in the indictment. The indictment was returned April 4, 1990, *i.e.*, more that six years next after the only "commission" alleged therein and proved at trial.

John DiPetto submitted allegedly false W–4's to his employers October 18, 1982, February 17, 1983, and February 7, 1984. These were the only allegedly false W–4's that John submitted that stopped withholding of taxes from his wages during 1983 and most of 1984.

John also submitted allegedly false W–4's to his employers on November 19, 1984 and March 26, 1985 which concededly had a small effect on his withholding for 1984 and a major effect for 1985.[3]

The Court of Appeals ruled that the statute of limitations started to run for each year on April 15 of the following year when the tax returns were due to be filed, rather than on the earlier dates when the W–4's were submitted. In reaching this conclusion, the Court of Appeals recognized that the statute of limitations runs from the last affirmative act of evasion. *See, Beacon Brass Company, supra.* However, the court considered the failure to file on April 15 of each year to constitute the last affirmative act of evasion for each preceding year. This is directly contrary to the holding in *Spies, supra.* By so holding, the court relied upon a mere omission as the event which triggers the statute of limitations, rather than the commission required by 26 U.S.C. 6531(2), as well as by *Spies* and *Beacon Brass.*

The Second Circuit's decision conflicts with *Beacon Brass* and with *Spies* because it considers the April 15 filing deadline, without more, to be an affirmative act of evasion sufficient to trigger the statute of limitations.

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[3] Michele's allegedly false W–4's submitted January 6, 1987 and April 15, 1987 and John's allegedly false W–4 submitted January 6, 1987 necessarily could not affect their wages in 1983 through 1986. These W–4's only could be admissible to prove petitioners' intent, Federal Rule of Evidence 404(b), not as affirmative acts of evasion.

**3. A conviction upon an indictment that charges willful evasion of assessment of taxes may not be supported where the evidence presented by the Government solely proves evasion of payment of taxes.**

In *Sansone v. United States*, 380 U.S. 343, 354 (1965), this Court held that the tax evasion statute, 26 U.S.C. 7201, defines two separate crimes, evasion of assessment of taxes and evasion of payment of taxes. Subsequent decisions of the courts of appeals have reaffirmed this principle. *See, United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988); *United States v. Voorhies*, 658 F.2d 710 (9th Cir. 1981).

The government concedes that this indictment charges evasion of assessment of taxes, *i.e.*, concealment of income so that the IRS could not assess the correct tax. Evasion of payment of taxes presupposes the correct assessment and occurs when affirmative acts are committed which evade payment of that tax assessment.

However, during the trial, the government argued only that false W–4's stop withholding and thereby deprive the government of the *payment* of taxes. The government could not, and did not attempt to, prove that the false W–4's concealed income so as to evade the *assessment* of taxes. Correct assessments could be made based on Forms W–2 from petitioners' employers and Forms 1099 from banks that paid interest to petitioners. *See*, 26 U.S.C. 6020(b). The government stipulated that petitioners provided their banks and their employers accurate identifying information which caused the banks and the employers to file with the IRS each year accurate Forms 1099 and W–2, respectively. The

government also stipulated that petitioners had no additional income that was not reflected on Forms 1099 and W–2. By providing accurate identifying information to all of their income payors, petitioners *assisted* the government in assessing their correct taxes. They certainly did not evade assessment.

Petitioners concede that the submission of false W–4's are affirmative acts that evade the *payment* of taxes. However, W–4's that falsely claim exempt status (as opposed perhaps to W–4's that falsely inflate withholding allowances, and therefore reduce taxable income) have no tendency whatsoever to conceal from all proper officers of the United States of America petitioners' true and correct taxable income, thereby to evade *assessment* of taxes. The latter is the only theory of evasion alleged in the indictment.

Because the evidence proved only affirmative acts that stopped the *payment* of taxes, whereas the indictment charged only affirmative acts that evaded the *assessment* of taxes by concealing taxable income, the proof fatally amended the indictment in violation of petitioners' right under the Fifth Amendment to be indicted by a grand jury.[4]

The Court of Appeals did not discuss this question.

[4] The result is not affected by *Schad v. Arizona*, ___ U.S. ___ (June 21, 1991). There, the indictment did not specify whether the first-degree murder that was charged was pre-meditated murder or felony murder, and the prosecutor advanced both theories. The plurality held that it was not required that the jury be unanimous as to a particular theory. Here, however, the indictment charged only an evasion of assessment theory, yet the government proved only an evasion of payment theory. Thus, the jury was unanimous, but only as to a theory that was not charged and of which petitioners had no notice.

**4. The District Court's failure to permit defendants to explain the legal provisions upon which they based their subjective good faith belief improperly prevented them from presenting a meaningful defense.**

The Court of Appeals' decision undermines the opinion of this Court in *Cheek v. United States*, 498 U.S. ___, 111 S.Ct. 604 (1991). It also conflicts with a recent decision of the Ninth Circuit which reversed a conviction based, *inter alia*, on failure by the District Court to permit defense evidence concerning provisions of law which, although previously inadmissible, now would be admissible to support the defense recognized in *Cheek*. *United States v. Powell*, ___ F.2d ___, 91-2 USTC para. 50, 320 (CCH) (9th Cir. June 13,1991).

In *Cheek*, this Court held that, in order to prove the element of willfulness, the government must prove that the defendant did not have a subjective belief that he was not required to file an income tax return. This Court also held that "...forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." ___ U.S. at ___, 111 S.Ct. at 611.

Here, the trial court did instruct the jury in accordance with a defense request that anticipated the holding in *Cheek*: "It is not necessary for the defendants to show that their good faith misunderstanding of the law was objectively reasonable. Just that they had such a sincere good faith misunderstanding of the law." However, by its evidentiary rulings and refusals to instruct the jury on pertinent provisions of law upon

which petitioners relied, the court undermined petitioners' ability to prove to the jury that they did have a subjective good faith misunderstanding of the law.

Petitioners presented testimony, from John DiPetto, that they both had a good faith belief that their duty to make a tax return under Internal Revenue Code Section 6012(a) was no greater than the Secretary's duty to make a return for them from available information under I.R.C. Section 6020(b). However, petitioners were not permitted to develop their reliance upon Section 6020(b) and its relation to Section 6012(a)(1), as they perceived it, or to have their expert witness testify that the available information was "nicely laid out" and sufficient to enable the Secretary to make a return for petitioners from "his own knowledge and from such information as he can obtain...". Moreover, the court refused to give the instruction requested by petitioners which tracked the language of Sections 6012(a)(1) and 6020(b) or any reasonable substitute therefor. Petitioners objected to this failure to instruct.

Moreover, the Court prevented petitioners from developing their other defense, *i.e.*, that the IRS could not be misled as required by *Spies*. After the defense mistakenly said in its opening statement that the IRS does not receive W-4's and, therefore, cannot be misled by W-4's, the government proved that the IRS did receive these W-4's. This implied that the IRS could be misled. However, the IRS does not receive all W-4's, and only received *these* W-4's pursuant to remedial Treasury Regulations that require employers to cull out and submit only highly suspicious W-4's, such as W-4's that claim exempt status. Treasury Regulations (26 C.F.R.) Section 31.3402(f)(2)-1(g)(1)(ii). Even though

the defense was incorrect about its minor premise (*i.e.*, the IRS did not receive these W-4's), the defense still was correct about its major premise (*i.e.*, the IRS does not rely upon any W–4's) and about its conclusion (*i.e.*, the IRS could not be misled by W–4's). The jury could not know the defense was correct because it never learned that the IRS only receives W-4's such as these in order to investigate them and in order to require the employer to withhold nearly maximum taxes. Treasury Regulations (26 C.F.R.) Section 31.3402(f)(2)-1(g).

By refusing to instruct the jury in accordance with these Regulations, the court prevented petitioners from presenting a meaningful defense contrary to the Due Process clause of the Fifth Amendment. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

One of the foregoing errors also was involved in the Ninth Circuit's opinion in *United States v. Powell, supra.* There, one defendant testified that she believed that the Service could file tax returns for her and her husband and that she was too busy to file her income taxes. The trial court in *Powell* refused to allow defendant to read Section 6020(b) to the jury. However, in response to a question from the jury asking if the IRS can or will file a tax return in behalf of a person who does not file, the trial court did read to the jury Section 6020(b). The trial court then added that this does not supplant the taxpayer's obligation to file.

The Ninth Circuit reversed, finding that the court misled the jury or misstated the law. The trial court was legally correct when it instructed the jury that Section 6020(b) did not supplant defendants' duty to file tax returns. However, this did not matter; what mattered is

whether defendants *believed* that Section 6020(b) relieved defendants of their duty, according to the Ninth Circuit.

The Ninth Circuit also reversed due to the court's failure to permit defendants to offer evidence concerning Section 6020(b). The Ninth Circuit held that the general rule that the District Court does not abuse its discretion when it does not allow the defendant to present law to the jury must give way when the defendant's sixth amendment rights hinge on admission of the law. The Ninth Circuit held that this refusal had the effect of forbidding the jury to consider evidence that might negate willfulness, contrary to *Cheek*. This constituted prejudicial error according to the Ninth Circuit's decision in *Powell*.

In the present case, the court refused to instruct the jury in accordance with Section 6020(b) and refused to permit John DiPetto to testify as to the basis of his understanding of the law, as in *Powell*. In addition, the court refused to permit the expert witness to testify to the IRS's practice of making returns in behalf of non-filers, a practice DiPetto testified he and his wife relied upon. The court also refused to instruct the jury on Section 6012(a) in relation to Section 6020(b). This would have supported DiPetto's testimony that he and Michele DiPetto perceived their duty to file a return (they "shall" make a return) as being no greater than the Secretary's duty to make a return for them (the Secretary "shall" make a return from his own knowledge and from such information as he can obtain). The court also refused to instruct the jury in accordance with the Treasury Regulations that, in petitioners' view, explain the reason that their W-4's were submitted to the IRS.

These rulings prevented petitioners from offering a meaningful defense, contrary to *Chambers, supra*, and, more specifically, forbade "the jury to consider evidence that might negate willfulness," raising a serious question under the Sixth Amendment's jury trial provision. This ruling is contrary to this Court's ruling in *Cheek, supra*, and at odds with the Ninth Circuit's interpretation of *Cheek* in *Powell, supra*.

The Second Circuit did not specifically discuss any of these evidentiary issues and jury instruction issues.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel of Record*
*for Petitioners*

July 1991

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 1647–August Term, 1990
(Argued May 22, 1991 Decided June 18, 1991)
Docket No. 90–1681

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UNITED STATES OF AMERICA,

*Appellee*,

—v.—

JOHN J. DiPETTO and MICHELE DiPETTO,

*Defendants–Appellants*.

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Before:

VAN GRAAFEILAND, MESKILL and McLAUGHLIN,

*Circuit Judges*.

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Appeal from a judgment of conviction of the United States District Court for the Southern District of New York, Cannella, J., entered after a jury trial. The DiPettos were convicted of four counts of income tax evasion in violation of 26 U.S.C. § 7201.

Affirmed.

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JARED J. SCHARF, White Plains, NY, *for Appellants.*

BRETT DIGNAM, Tax Division, Department of Justice, Washington, D.C. (Shirley D. Peterson, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Tax Division, Department of Justice, Washington, D.C.), *for Appellee.*

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*Per Curiam:*

This is an appeal from a judgment of conviction of the United States District Court for the Southern District of New York, Cannella, J., entered after a jury trial. John and Michele DiPetto were found guilty of four counts of willfully and knowingly attempting to evade income taxes in violation of 26 U.S.C. § 7201. On appeal the DiPettos contend the government failed to prove the elements of evasion of the assessment of income tax as it was charged in the indictment. They also claim that the statute of limitations applicable to any counts arising out of the false forms W–4 filed in 1983 had expired before the indictment was returned.

Affirmed.

We reject the DiPettos' arguments. There was ample evidence in the record to support the jury's conviction of the DiPettos for evasion of income tax as it was charged in the indictment. The Supreme Court has specified the three elements of income tax evasion; (1) "willfulness;" (2) "the existence of a tax deficiency;" and (3) "an affirmative act constituting the evasion or attempted evasion of the tax." *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). The evidence substantiated the jury's necessary conclusion that the DiPettos filed false forms W–4 in an attempt to mislead the government or conceal from the government the correct amount of their taxable income. Furthermore, by maintaining rather than correcting the false W–4s the DiPettos perpetuated their attempted deception. *See United States* v. *Williams*, 928 F.2d 145, 149 (5th Cir. 1991). The filing and maintaining of the false forms W–4 satisfied the affirmative act requirement set forth in *Spies* v. *United States*, 317 U.S. 492, 499 (1943). After April 15 of each year in which the DiPettos failed to file tax returns a substantial tax was owed to the government. Finally, the record supports the finding that the DiPettos acted willfully in an attempt to avoid the income taxes. Thus, all elements of income tax evasion, 26 U.S.C. § 7201, were satisfied. *See Sansone*, 380 U.S. at 351.

We next focus our attention on the DiPettos' contention that the statute of limitations had expired with respect to those charges arising from the false W–4s filed in 1983. We reject this claim as well.

The Supreme Court has stated that the statute of limitations period does not begin to run until the underlying crime has been committed. *United States* v.

*Habig*, 390 U.S. 222, 225 (1968). The DiPettos violated 26 U.S.C. § 7201 by attempting to mislead or to conceal with respect to their tax liability and then willfully failing to file a tax return. Both elements were required to satisfy section 7201. In view of *Habig* we conclude that the statute of limitations did not begin to run until both of these requirements were met. Thus, the limitations period began on the day on which the tax returns were due. At that point both elements of a section 7201 violation had been established. The false W–4s had previously been filed and there existed a substantial tax deficiency. In reaching this conclusion we are in accord with several other courts which have held that a section 7201 prosecution involving the failure to file income taxes is timely if commenced within six years of the day of the last act of evasion, whether it is the failure to file a return or some other act in furtherance of the crime. *See, e.g., Williams*, 928 F.2d at 149; *United States* v. *Ferris*, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987) (if failure to file return is last act of evasion, the statute runs from the date the return and tax were due); *United States* v. *Crocker*, 753 F.Supp. 1209, 1214 (D. Del. 1991) (in evasion action based on false W–4s and nonpayment of tax, statute begins to run from day that returns were due); *United States* v. *Sloan*, 704 F.Supp. 880, 883 (N.D. Ind. 1989) (limitations period runs from date of last act of evasion, the failure to file taxes); *United States* v. *Sherman*, 426 F.Supp. 85, 89 (S.D.N.Y. 1976) (completion of offense necessary to commencement of limitations period).

We have reviewed the DiPettos' other contentions and find them to be lacking in merit.

For the foregoing reasons the judgment of conviction of the district court is affirmed.

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| -v- | : | INDICTMENT |
| | : | |
| JOHN JOSEPH DIPETTO and MICHELE DIPETTO, | : | 90 CRIM. 187 |
| Defendants. | : | |

### COUNT ONE

The Grand Jury charges that:

From on or about September 27, 1982, through on or about April 16, 1984, in the Southern District of New York, JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, did unlawfully, willfully and knowingly attempt to evade and defeat a substantial part of the income tax due and owing by them to the United States of America for the calendar year 1983 by various means including failing to make an income tax return for the calendar year 1983 on or before April 16, 1984, as required by law, to any proper officer of the Internal Revenue Service, failing to pay to the Internal Revenue Service said income taxes, and submitting to their employers false and fraudulent Employee Withholding Allowance Certificates, Forms W–4, on which JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, claimed exemption from the withholding of income taxes, for the purpose of concealing and

attempting to conceal from all proper officers of the United States of America their true and correct income for the calendar year 1983, whereas JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, then and there well knew and believed that they had joint taxable income for the calendar year 1983, in the approximate sum of $110,562.00, and that upon said taxable income there was a substantial income tax due and owing to the United States of America in the approximate sum of $40,132.00.

(Title 26, United States Code, Section 7201.)

## COUNT TWO

The Grand Jury further charges that:

From on or about September 27, 1982, through on or about April 15, 1985, in the Southern District of New York, JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, did unlawfully, willfully and knowingly attempt to evade and defeat a substantial part of the income tax due and owing by them to the United States of America for the calendar year 1984 by various means including failing to make an income tax return for the calendar year 1984 on or before April 15, 1985, as required by law, to any proper officer of the Internal Revenue Service, failing to pay to the Internal Revenue Service said income taxes, and submitting to their employers false and fraudulent Employee's withholding Allowance Certificates, Forms W–4, on which JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, claimed exemption from the withholding of income taxes, for the purpose of concealing and attempting to conceal from all proper officers of the United States of America their true and correct income

for the calendar year 1984, whereas JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, then and there well knew and believed that they had joint taxable income for the calendar year 1984, in the approximate sum of $120,159.00, and that upon said taxable income there was a substantial income tax due and owing to the United States of America in the approximate sum of $41,902.00.

(Title 26, United States Code, Section 7201.)

**COUNT THREE**

The Grand Jury further charges that:

From on or about September 27, 1982, through on or about April 15, 1986, in the Southern District of New York, JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, did unlawfully, willfully and knowingly attempt to evade and defeat a substantial part of the income tax due and owing by them to the United States of America for the calendar year 1985 by various means including failing to make an income tax return for the calendar year 1985 on or before April 15, 1986, as required by law, to any proper officer of the Internal Revenue Service, failing to pay to the Internal Revenue Service said income taxes, and submitting to their employers false and fraudulent Employee's Withholding Allowance Certificates, Forms W–4, on which JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, claimed exemption from the withholding of income taxes, for the purpose of concealing and attempting to conceal from all proper officers of the United States of America their true and correct income for the calendar year 1985, whereas JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants,

then and there well knew and believed that they had joint taxable income for the calendar year 1985, in the approximate sum of $129,661.00, and that upon said taxable income there was a substantial income tax due and owing to the United States of America in the approximate sum of $45,866.00.

(Title 26, United States Code, Section 7201.)

**COUNT FOUR**

The Grand Jury further charges that:

From on or about September 27, 1982, through on or about April 15, 1987, in the Southern District of New York, JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, did unlawfully, willfully and knowingly attempt to evade and defeat a substantial part of the income tax due and owing by them to the United States of America for the calendar year 1986 by various means including failing to make an income tax return for the calendar year 1986 on or before April 15, 1987, as required by law, to any proper officer of the Internal Revenue Service, failing to pay to the Internal Revenue Service said income taxes, and submitting to their employers false and fraudulent Employee's Withholding Allowance Certificates, Forms W–4, on which JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, claimed exemption from the withholding of income taxes, for the purpose of concealing and attempting to conceal from all proper officers of the United States of America their true and correct income for the calendar year 1986, whereas JOHN JOSEPH DIPETTO and MICHELE DIPETTO, the defendants, then and there well knew and believed that they had joint taxable income for the calendar year 1986, in the

approximate sum of $151,773.00, and that upon said taxable income there was a substantial income tax due and owing to the United States of America in the approximate sum of $56,050.00.

(Title 26, United States Code, Section 7201.)

Foreman

OTTO G. OBERMAIER
United States Attorney

## APPENDIX C

## TREASURY REG. §31.3402(f)(2)–1(g)

(g) *Submission of certain withholding certificates*—(1) *General rule.* An employer shall submit, in accordance with paragraph (g)(3) of this section, a copy of any withholding exemption certificate, together with a copy of any written statement received from the employee in support of the claims made on the certificate, which is received from the employee during the reporting period (even if not in effect at the end of the quarter) if the employee is employed by that employer on the last day of the reporting period and if—

(i) The total number of withholding exemptions (within the meaning of section 3402(f)(1) and the regulations thereunder) claimed on the certificate exceeds 14, or

(ii) The certificate indicates that the employee claims a status exempting the employee from the withholding, and the exception provided by paragraph (g)(2) of this section does not apply.

(2) *Exception.* A copy of the certificate shall not be submitted under paragraph (g)(1)(ii) of this section if the employer reasonably expects, at the time the certificate is received, that the employee's wages (under chapter 24 of the Code) from that employer shall not then usually exceed $200 per week.

* * *

(4) *Other withholding exemption certificates.* An employer shall also submit a copy of any currently effective withholding exemption certificate (or make the original certificate available for inspection), together with a copy of any written statement received from the employee in support of the claims made on the certificate, upon written request of the Internal Revenue

Service. This request of the Service may relate either to one or more named employees or to one or more reasonably segregable units of the employer. In this regard, the Service may, by written notice, advise the employer that a copy of each new withholding exemption certificate received from one or more named employees, or from one or more reasonably segregable units of the employer, which is required, under paragraph (g) to be submitted to the Service is to be submitted to the District Director. The employer shall then submit to the District Director a copy of each such new certificate of each such employee immediately after the employer receives the new certificate from the named employee.

(5) *Computation of withholding.* (i) Until receipt of written notice from the Internal Revenue Service that a certificate, a copy of which was submitted under this section, is defective, that certificate is effective and the employer shall withhold on the basis of the statements made in that certificate, unless that certificate must be disregarded under the provisions of subdivision (vi) of this paragraph (g)(5).

(ii) The Internal Revenue Service may find that a copy of a withholding exemption certificate contains a materially incorrect statement or it may determine, after written request to the employee for verification of the statements on the certificate that it lacks sufficient information to determine if the certificate is correct. If the Internal Revenue Service so finds or determines and notifies the employer that the certificate is defective, the employer shall then consider the certificate to be defective for purposes of computing amounts of withholding.

(iii) If the Internal Revenue Service notifies the employer that the certificate is defective, the Internal Revenue Service will, based upon its findings, advise the

employer that the employee either is not entitled to claim a status exempting the employee from withholding or is not entitled to claim a total number of withholding exemptions in excess of a number specified by the Internal Revenue Service in the notice, or both. The Internal Revenue Service will also specify the Internal Revenue Service Office to be contacted for further information.

(iv) The Internal Revenue Service will provide the employer with a copy for the employee of each notice it furnishes to the employer under this paragraph (g)(5) in addition to the notice furnished to the employer for his own use.. The Internal Revenue Service will also mail a similar notice to the employee at the address of the employee as shown on the certificate under review.

(v) The employer shall promptly furnish the employee who filed the defective certificate, if still in his employ, with a copy of the written notice of the Internal Revenue Service with respect to the certificate and may request another withholding exemption certificate from the employee. The employer shall withhold amounts from the employee on the basis of the maximum number specified in the written notice from the Service.

(vi) If and when the employee does file any new certificate (after an earlier certificate of the employee was considered to be defective), the employer shall withhold on the basis of that new certificate (whenever filed) as currently effective only if the new certificate does not make a claim of exempt status or of a number of withholding exemptions which claim is inconsistent with the advice earlier furnished by the Internal Revenue Service in its written notice to the employer. If any new certificate does make a claim which is inconsistent with the advice contained in the Service's written notice to the employer, then the employer shall disregard the new

certificate, shall not submit that new certificate to the Service, and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service.

(vii) If the employee makes a claim on any new certificate that is inconsistent with the advice in the Service's written notice to the employer, the employee may specify on such new certificate, or by a written statement attached to that certificate, any circumstances of the employee which have changed since the date of the Service's earlier written notice, or any other circumstances or reasons, as justification or support for the claims made by the employee on the new certificate. The employee may then submit that new certificate and written statement either to (A) the Internal Revenue Service office specified in the notice earlier furnished to the employer under this paragraph (g)(5), or to (B) the employer, who must then submit a copy of that new certificate and the employee's written statement (if any) to the Internal Revenue Service office specified in the notice earlier furnished to the employer. The employer shall continue to disregard that new certificate and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service unless and until the Internal Revenue Service by written notice (under subdivision (iii) of this paragraph (g)(5)) advises the employer to withhold on the basis of that new certificate and revokes its earlier written notice.

(6) *Definition of employer.* For purposes of this paragraph (g), the term "employer" includes any individual authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions. [Reg. §31.3402(f)(2)–1.]